19 51 **File No.** Separation of L.A. and L.C./51.

Legal Department

B **BRANCH**

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**Subject:—** Separation of the Office of Secretaries to the Bombay Legislative Assembly and the Bombay Legislative Council from the Legal Department of the Secretariat.

P.14/F

**File No.** 'Separation of L.A. and L.C./51

Gen. 194 e.

391- B.

STATEMENT OF THE CASE.

Article 187 of the Constitution provides that the Houses of the Legislature shall have a separate Secretariat. Clause (2) of the article provides that the Legislature of a State may by law regulate the recruitment and the conditions of service of persons appointed to the secretarial staff of the Houses of the Legislature. Clause (3) of the article provides that until provision is made by the Legislature of the State under clause (2), the Governor may, after consultation with the Speaker of the Legislative Assembly and the Chairman of the Legislative Council, make rules regulating the recruitment and the conditions of service of person appointed to the secretariat staff. Accordingly until the Houses of the Legislature make a law under clause (2) of article 187, it is proposed to make rules under clause (3) regulating the conditions of service of the persons to be appointed to the secretarial staff of the Legislature. The Department of the Bombay Legislature under the directions of the Chairman of the Bombay Legislative Council and he Speaker of the Bombay Legislative Assembly has proposed duty rules to be made by the Government. A copy of the said draft is appended as appendix A to this statement. Rule 8 of the said draft is as follows:-

"8. (1)(a) Appointment to the post of the Secretary shall be made either -

(i) by promotion
(ii) by nomination or
(iii) by transfer of a person from the State or other services.

The candidate for appointment must be a Bachelor of laws or a Barrister. When the appointment is made by nomination he must be a Bachelor of Laws or a Barrister of at least 7 years' standing and not more than 40 years of age at the date of appointment. In either case he must be particularly conversant with the practice and procedure of the Legislature and must have good knowledge of constitutional law.

(b) Appointment to the post of the Assistant Secretary shall be made either -

(i) by promotion from among the Members of the Upper Division in the Legislature Department.
(ii) by nomination, or
(iii) by transfer of a person from the State or other services.

When the appointment is made by nomination the candidate for appointment must be a Bachelor of Laws or a Barrister of at least 5 years' standing and not more than 35 years of age at the date of appointment when the appointment is made by promotion or transfer the candidate must be a Bachelor of Laws or a Barrister. In either case he must be conversant with the practice and procedure of the Legislature and must have good knowledge of constitutional law.

(c) Appointments to the posts of Deputy Secretary and other Gazetted Officers shall be made in the same manner as the appointment to the post of the Assistant Secretary is made.

(2) The Secretary, the Deputy Secretary the Assistant Secretary and the other Gazetted Officers, if any, shall be appointed by the Governor, after consultation with the Board, from being the persons recommended by the Public Service Commission as suitable for appointment.

(3) The recommendations of the Board in this behalf will be binding on the Governor."

Sub-rule (3) provides that the recommendation of the Board in this behalf will be binding on the Governor.

2. The question whether sub-rule (3) of the draft rule 8 is legal was considered by the Legal Department. It was pointed out to the Bombay Legislature Department that the sub-rule is open to iobjection. Although the Constitution provides for a separate Secretariat of the Legislature the member of the staff are person who belong to the Civil Service of the State and their appointment will have to be made by the Governor/to make rules for recruitment of the staff. But such rules cannot be inconsistent with the provisions of the Constitution. To provide in the rules that the Boards recommendation shall be binding on the Governor is to make the Board an appointment authority. Such a provision would not be consistent with the Constitution. It was suggested

Art 187 no doubt empowers the Governor

that rule 8 may be revised as follows:

"8. (1)(a) Appointment to the post of the Secretary shall be made either -

(i) by promotion,
(ii) by nomination, or
(iii) by transfer of a person from the State or other services.

The candidate for appointment must be a Bachelor of Laws or a Barrister. When the appointment is made by nomination he must be a Bachelor of Laws or a Barrister of at least 7 years' standing and not more than 40 years of age at the date of appointment. In either case he must be particularly conversant with the practice and procedure of the Legislatures and must have good knowledge of constitutional law.

(b) Appointment to the post of the Assistant Secretary shall be made either -

(i) by promotion from among the Members of the Upper Division in the Legislature Department,
(ii) by nomination, or
(iii) by transfer of a person from the State or other services.

When the appointment is made by nomination the candidate for appointment must be a Bachelor of Laws or a Barrister of at least 5 years' standing and not more than 35 years of age at the date of appointment. When the appointment is made by promotion or transfer the candidate must be a Bachelor of Laws or a Barrister. In either case he must be conversant with the practice and procedure of the Legislatures and must have good knowledge of constitutional law.

(c) Appointments to the posts of the Deputy Secretary and other Gazetted Officers of the Department shall be made in the same manner as the appointment to the post of the Assistant Secretary is made.

(2) The Secretary, the Deputy Secretary, the Assistant Secretary and other Gazetted Officers.

Gazetted Officers, if any, shall be appointed by the Governor, after consultation with the Board, from among the persons recommended by the Public Service Commission as suitable for appointment". The suggestion was that the Secretary and other officers of the legislature should be appointed by the Governor after consultation with the Board. The Chairman of the Bombay Legislative Council and the Speaker of the Bombay Legislative Assembly do no agree with this view and observe as follows:-

"We have no objection to the deletion of sub-rule (3) of rule [illegible]. We do not, however, see any authority for the proposition made in para. 3 of Shri Dhurandhar's opinion that appointments of persons who belong to the Civil Service of the

State must necessarily be made by the Governor. In our opinion, in the law to be made by the State Legislature under clause (2) of Article 187 regulating the recruitment of the secretarial staff of the legislature, it would be perfectly open to the legislature to make a provision to the effect that the Speaker or the Chairman to the case may be or both shall be the appointing authority so far as the recruitment to the secretarial staff of the legislatue is concerned. If so, there appears to be no objection to such a rule being framed by the Governor under clause(3) of that Article. We do not see any constitutional difficulty so such a rule being framed. In this connection we would like to invite Government's attention to para 2 of Shri Ladda opinion No. 7292 dated 7.6.1950 given in anotherconnection from which it will appear that the function from which it will appear that the function of recruitment of the legislature secretarial staff can be assigned to the Speaker or any other authority.

2. Actually, the Governor of Madhya Pradesh has made such a rule vesting the power appointments of officers of the legislature in the Speaker of Madhya Pradesh. Similar rule is contemplated by West Bengal. In Orissa, the appointments of gazetted officers are made by the Speaker in consultation with the Chief Minister, and in the Parliament the Speaker makes all such appointments in consultation with the Prime Minister.

Having regard to these facts, we do not think that there should be any difficulty in making the Board an appointing authority. We, therefore, suggest that sub-rule (2) of rule 8 should be amended as follows:-

'(2) The Secretary, the Deputy Secretary, the Assistant Secretary and the other gazetted officers, if any, shall be appointed by the Board, after consultation with the Chief Minister, from amongst the persons recommended by the Public Service Commission as suitable for appointment.'

3. The object and spirit underlying Article 187 is to ensure complete independence to the Speaker and Chairman from any kind of executive control in regard to matters pertaining to the Legislature secretariat. In order to give ful effect to the implications of that Article we think it is necessary to make the folllowing further amendments in the rules:-

(1) In Rule 3, in the last two lines, for the words 'the Governor may, in consultation with the Board' the words 'the Board may' should b substituted.

(2) In Rule 5, the words'subject to the ultimate authority of the Governor' should be deleted.

(3) In Rule 13, for the words"the Governor may, from time to time, in consultation with the Board" the words 'the Board may, from time to time in consultation with the Chief Minister' should be substituted.

(4) In Rule 14, for the words 'except by the Governor after consulting the Board', the words 'the Board' may be substituted.

(5) In Rule 15 the words 'and the appellate authority should be the Governor' should be deleted.

(6) In Rule 16(1), the words 'and the Governor may be omitted.

(7) In Rule 18(2) for the words 'the Governor the words the Chief Minister' should be substituted."

The gist of the suggestion of the Chairman and the Speaker is that in the case of the appointment of the Speaker is that in the case of the secretarial of staff of the Legislature, the appointing authority should be the Chairman and the Speaker and not the Governor or any authority subordinate to him.

3. It is true that article 187 provides that the Legislature should have a separate secretarial staff. But the said articel does not as stated by the Speaker and the Chairman give them complete independence from the control of the executive Government. Under that article (1) the recruitment and the conditons of service of the staff of the Legislature are to be regulated by law to be made by the Legislature of the State or until such law is made by rules made by the Governor. But any such law or rules cannot give such independent powers to the Speaker and the Chairman as would be inconsistent with the provisions of the Constitution. Clauses (2) and (3) of articel 187 themselves draw distinction between recruitment and conditions of service on the one hand and the appointment on the other. Both the clauses refer to the recruitment and conditions of service of persons to be appointed. Recruitment may lay down qualifications for persons to be eligible for appointment. But it does not include the actual power of appointment. Article 187

may be compared with article 229 which relates to the officers and servants of the High Court. It expressly refers to the appointment of their officers There are several articles which also refer to appointment expressly (see articles 233 and 234) Wherever the intention was that the appointment authority should be different from the Governor or the power of making rules governing the conditions o service of any staff should be exercised by such different authority, the Constitution has made specific provision to that effect. The power to appoint and to determine the strength of the staff o the Legislature cannot, therefore be vested in the Speaker and the Chairman but must remain with the executive Government.

4. Article 310 of the Constitution provides that except as expressly provided by the Constitution, every State servant holds his office during the pleasure of the Governor. Under article 154 the executive power of the State vests in the Governor and is to be exercised by him either direct or through officers subordinate to him. Article 311 of the Constitution provides that no State servant shall be dismissed or removed by an authority subordinate to that by which he was appointed. It is therefore clear that the members of the secretar staff of the Legislature who are undoubtedly State servants and for whose appointment, removal or dismissal the Constitution does not otherwise provide expressly, will have to be appointed either by the Governor or any authority subordinate to him. The is not doubt that both the Chiairman and the Speake cannot be held to be authorities subordinate to the the Governor. It does not appear that either the Chairman or the Speaker will accept such a position

under the Constitution. Under articles 178 and 182 of the Constitution theyare to be chosen by the Council or the Assembly, as the case may be, andas expressly provided in the Constitution they are the officers of the State Legislature and their appoint — ment has been expressly provided for in those articles. Although article 187 is included under the said heading, as stated baove it does not expressly provide for the appointment of the members of the secretarial staff. It would therefore appear that the power of the appointment of the said members cannot be delegated or transferred by the Governor to the Speaker or the Chairman as proposed by them. It is stated in the note of the Chairman and the Speaker that the object and spirit underlying articel 187 is to ensure complete independence to the Speaker and Chairman from any kind of executive control in regard to matters pertaining to the Legislature Secretariat. Whatever may be the intention of the Constitution in enacting article 187, it seems clear that it has not, as it has in the case of the staff of the High Court or the Supreme Court, made express provision that the members of the Secretarial staff of the Legislature should be appointed by any authority other than the Governor or an officer subordinate to him or that they should not hold their office at the pleasure of the Governor or such officers, notwithstanding anything contained in articles 310 and 311.

5. A similar question arose under the old Constitution in regard to the appointment of the Official Assignne of the High Court. The Official Assignee under the Presidency Towns Insolvency Act before it was adapted by the Order-in-Council was appointed by the Chief Justice of the High Court and

was paid out of the proceeds of the investments in his hands, and he was removable by the Chief Justice with the concurrence of a majority of the other Judges of the High Court. But when the system was changed and his emoluments were paid out of the State revenues he became a State servant. The Presidency Towns Insolvency ~~became a State servant. The Presidency~~ Act was then adapted by the British Parliament by empowering the State Government to appoint the Official Assignee in the Bombay State: cf. section 77(1)(c) of the Presidency Towns Insolvency Act, 1909.

6. In view of the constitutional position stated above, it would not be legal to accept the suggestion of the Chairman and the Speaker. At the most by convention it may be provided that the recommendation of the Speaker and the Chairman will be accepted by Government in making appointments.

7. As important constitutional issues have been raised in this case, the Advocate General is requested to favour Government with his views in the matter at an early date.

Sd. J.R.Dhurandhar.
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Remembrancer of Legal Affairs.

U.R. to Advocate General No. 13951, dated the 30th August 1951.

VGP. 4-7-56.

No. 13 of 1951. Advocate General's Chambers.
17th September 1951.

OPINION.

Re: U.R. to the Advocate General No. 13951 dt. 30th Aug. 51:

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Article 187 of the Constitution corresponds to Article 98 of the Constitution. The Scheme of both the Articles is to authorise the Legislature to pass a law regulating the recruitment and the conditions of service of the Secretarial Staff. Under both the Articles, until such a law is passed power is given to the President in the Centre and to the Governor in the State to frame rules for recruitment ~~and to the Governor in the State to drame rules for recruitment~~ and conditions of service.

Under article 187(3) the power to makes rules is with the Governor. The Governor is empowered to make rules after consultation with the Speaker of the Legislatuve Assembly or the Chairman of the Legislative Council, as the case may be, Such rules can be in operation only until a law is passed by the Legislature under Article 187(2).

I am of opinion that the word 'recruitment' includes appointment. The words 'recruitment and conditions of service' appear in Article 309 and it seems that under Article 309 recruitment includes power of appointment. Under Article 154 of the executive power of the State vests in the Governor. Article 168 provides that the Legislature of every State consists of Governor and the Houses of Legislature. Every bill passed by the Legislature must have the assent of the Governor before it becomes an Act.

Thus under the Constitution the position of the Governor is at the head of both the Executive Government and the Legislature. In the parliamentary debate

it has been made clear that the position of the Governor and the President as constitutional head would be estab — lished by conventions. There is no provision in the Cons — titution which in terms provides for the selection of the Chief Minister and the Ministers from the majority parties. Such a matter is left for convention. The rules under rules Article 187(3) are to be framed by the Governor and it will amount to abrogation of the functions of the Governor con — ferred upon him under the Constitution if a rule is framed which is interms provides for appointment of the Secretarial Staff by other authorities. Such a rule would be inconsis— tent with the position of the Governor. A rule which may provide that the advice given by the Speaker or the Chair — man would be binding upon the Governor would be inconsis- tent with the position of the Governor under the Constitution and with the letter and spirit of Article 187(3), The pro visional nature and operation of the rules alsoindicates that under the rules Governor should bethe final authority.

It has also to be borne in mind that the Secretarial Staff will be of a peemanent nature. In the event of sus pension of Legislature under Article 356 of thee Constitution difficulties maya rise with regard to the Secretarial Staff. In the event of a change of Government on account of a change in the Strength of parties difficulties may also arise. I am therefore of opinion that under the rules to be framed by the Governor under Article 187(3) the power of appointment must vest in the Governor. The Constitution does contemplate and there is room for establishment of Convention. A conven- tion that the Governor should appoint a person recommended by the Speaker and the Chairman would be proper and consistent with the Constitution.

THE ADVOCATE GENERAL OF BOMBAY.

OFFICE OF THE R.L.A.

As Importantconstitutional issues have been raised in this case, the Advocate General was consulted. Copies of the Statement of the Case No.13951 dated 30th August 1951 sent to the Advocate General and of the Advocate General's opinion No. 13 dated 17th September 1951 are appended. In view of the Constitutional position stated in the Advocate General's opinion the suggestions made by the Speaker and the Chairman for amendment of the draft rules will not be in order.

Sd. J.R.Dhurandhar.
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Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 196- dated the 20th September 1951.

VGP. 4-7-56.

OFFICE OF THE R.L..A

The question for consideration is whether there is any legal or constitutional objection to an issuing the draft G.R. at page 31 ante. As contemplated by article 187 of the Constitution, the Secretarial Staff of the Legislature will be governed by certain law and within that law and subect to that law (1) will function independentlu of the Executive. But inrospect of all matters which do not fall within the sphere of that law and also in respect of matters which that law assigns to the Governor or which all within the scope of the entries 38 and 39 in List II in the Seventh Schedule to the Constitution, all executive and legislatuve actions will have to be taken through some department of Government. It is therefore proposed that the Bombay Legislature Department should in such matters obtain the ordrs of Govornment through some administrative Department.

2. The Chairman of the Legislative Council and the Speaker of the lLegislative Assembly to not agree with the above view and observe as follows :-

"We have considered the opinion of the R.L.A. In pra ragrpah 3 thereof he says that "apart from the Secretarial Staff there are a number of matters connected with the Legislature itself which must come within the purview of some Administrative Department ( see Entry Nos. 38 and 39 In List II of the Seventh Schedule to the Constitution of India). The R.L.A. does however, mention which those matters are. He only refers to entries Nos. 38 and 39 in List II of the Seventh Schedule to the Constitution. List II in the Seventh Schedule enumerates matters with respect to which the Legislatur of a State specified in Part A or Part B of the First Schedule has exclusive power to make laws for such State or any part thereof. In our opinion, none of these matters, including matters mentioned in entries Nos. 38 and 39 pertain to the Legislature Secretariat. They may relate to the Legislature as such but they have no connection with the Legislature

Secretariat itslef which is distinct and different from the Legislature. They are matters of legislation which can be introduced or amended by any official or non-official member.

The administration of legislature is quite distinct from the administration of the Legislature Secretariat. The only other matters which could possibly be conceived as relating to the Administration of the Legislature Secretariat would be the requirements in regard to its personal and supplies. In regard to these matters the only Department of Government which would be required to be consulted would be the Finance Department, and if there is any difference of opinion in these matters between the Speaker and the Minister, the difference could be resolved by reference to the Chief Minister as is done at the Centre.

Therefore taking into consideration the smooth working of the Bombay Legislature Department, the practice existing at the Centre and also having regard to the spirit and intention of Articles 187 we do not agree to the proposal of putting the Legislature Department under the administrative control of any Secretariat Department. We, therefore do not agree to the proposed G.R. "

3. The constitutional position has been examined by the Advocate General recently and attention is invited to his opinion No. 13 dated 17th September 1951 recorded on P. & S.D. D Branch file 7807/48 (copy appended for ready reference). The Advocate General has held that "the Governor is at the head of both the Executive Government and the Legislature. Any rule or law which may provide that the advice given by the Chairman and the Speaker would be binding upon the Governor would be inconsistent with the position of the Governor under the Constitution and with the letter and spirit of article 187(3)." In the exercise of his functions under the Constitution the Governor is to act with the aid and advice of his Council of Ministers. (See article 163(1)). Articel 166(3) provides that the Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the

4. Article 310(1), which would apply to the Secretariat staff of the state Legis- latures lays down that except as expressly provided by the Constitution, every person ~~35~~ who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor. In disciplinary matters the final decision, therefore, vests with the Governor. Similarly, under article 320(3) the State Public Service Commission will have to be consulted in the matters specified in that article in relation to any civil service or post, unless such matters are excluded by the Governor from the purview of the Commission. Government will have to decide what posts of the Legislature Secretariat staff should be excluded from the purview of the Public Service Commission. As the expenditure on the Secretariat staff of the State Legislature is not charged on the Conlolidated Fund of the State, Government will have to decide what sum would be required to meet the expenditure and to get necessary demands for grants passed by the Legislative Assembly (See articles 202 and 203 and R.L.A's opinion No. 1269 dated 19th January 1951) (copy appended). The above are some of the matters arising in connection with the working of the Bombay Legislature Department, which do not fall within the purview of the law or the rules contemplated by article 187. Such matters or matters which are assigned to the Governor by any law or rules made under article 187 or policy to be adopted on any legislation under entries 38 and 39 in List II will be a part of Government business within the meaning of article 166 and will have to be allotted to some Minister. The said article requires that all executive action of Government shall be expressed to be taken in the name of the Governor.

Under article 154 (1), the executive power of the State is vested in the Governor and is to be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. As the Honourable the Speaker and the Honourable the Chairman are not officers subordinate to the Governor (see heading above article 178) orders in such matters will have to be issued through some administrative Departments of Government.

5. In view of the position stated above there is no alternative but to place the matters refered to in the proposed G.R. under the control of some Department of Government.

o/c Sd/-

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Remembrancer of Legal Affairs.

U.R. to P.& S.D. No. 15985, dated the 8th October 1951.

C.G.R./10-8 /